

82476-2
COA NO. 36715-7-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

CITY OF ABERDEEN,

Appellant,

v.

FRANCIS REGAN,

Respondent.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR GRAYS HARBOR COUNTY

The Honorable F. Mark McCauley, Judge

BRIEF OF RESPONDENT

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A. ISSUE PERTAINING TO APPELLANT'S ASSIGNMENT OF ERROR

A condition of respondent's probation is the requirement of "no criminal law violations." While on probation respondent was charged with fourth degree assault and criminal trespass. A jury acquitted respondent of those offenses. Later, the trial judge ruled respondent violated the "no criminal violations of law" condition of probation based on the finding respondent committed the criminal trespass despite the jury's acquittal. Respondent appealed to the Superior Court and that court reversed the trial court, holding the "no criminal violations of law" condition required the State to prove a violation of a criminal statute beyond a reasonable doubt and the jury's acquittal foreclosed finding a violation of "no criminal violations of law" condition of respondent's probation. Where respondent was acquitted of the alleged criminal violations did the court erroneously find respondent violated the condition of his probation that he commit "no criminal violations of law" where that finding was based on the same allegations?

B. STATEMENT OF THE CASE

Respondent, Francis Regan, accepts the appellant's Statement of the Case. Brief of Appellant (BOA) at 1-2.

C. ARGUMENT

THE CONDITION OF PROBATION PROHIBITING REGAN FROM COMMITTING NO CRIMINAL LAW VIOLATIONS REQUIRED THE STATE TO PROVE A VIOLATION OF A CRIMINAL STATUTE BEYOND A REASONABLE DOUBT.

The issue in this case is whether Regan's acquittal foreclosed the court from revoking his probation under the condition of probation that he has "no criminal violations of law." This Court should affirm the Grays Harbor Superior Court's ruling that the Aberdeen Municipal Court erroneously found Reagan violated his probation even though a jury acquitted him of the offenses that were the sole basis of the allegation he violated this condition of probation.

A court's decision to revoke probation lies within its sound discretion. State v. Kuhn, 81 Wn.2d 648, 650, 503 P.2d 1061 (1972). However, the de novo standard is applied when the appellate court stands in the same position as the trial court and may make a determination as a matter of law. State v. Garza, 150 Wash.2d 360, 366, 77 P.3d 347 (2003). Because the issue on review does not involve factual determinations, this Court should apply the de novo standard.¹

Generally, the reasonable doubt standard applicable to criminal trials does not apply to probation revocation hearings. The standard

¹ The State frames the issue on review as whether the Superior Court erred as a matter of law. (Brief of Appellant (BOA) at 1-2. The State's identification of the issue also supports de novo review.

applied to probation revocations is the proof must "reasonably satisfy" the court that the breach of the condition occurred. Standlee v. Smith, 83 Wn.2d 405, 409, 518 P.2d 721 (1974); State v. Kuhn, 81 Wn.2d at 650.

At the probation revocation hearing, the court need not be furnished with evidence establishing guilt of criminal offenses beyond a reasonable doubt. . . . All that is required is that the evidence and facts be such as to reasonably satisfy the court that the probationer has breached a condition under which he was granted probation, or has violated any law of the state or rules and regulations of the Board of Prison Terms and Paroles.

State v. Kuhn, 81 Wash.2d 648 at 650 (citations omitted).

The State argues that because the "reasonably satisfy" standard of proof is different than the "reasonable doubt" standard, a dismissal or acquittal of a crime does not bar a probation revocation based on the same conduct. BOA at 2-3. In support of that proposition, the State cites State v. Barry, 25 Wn. App. 751, 611 P.2d 1262 (1980), State v. Cyganowski, 21 Wn.App. 119, 584 P.2d 425 (1978) and State v. Fry, 15 Wn.App. 499, 550 P.2d 697 (1976)².

Under certain circumstances the law allows a probation revocation based on allegations of a criminal offense even though a probationer has

² In Fry, the issue was whether there was sufficient evidence to support the court's order revoking Fry's probation. The Fry court found the evidence sufficient. State v. Fry, 15 Wn.App. at 502. Fry does not address the issue in this case.

been acquitted of the crime because of the different burdens of proof. However, what the State is required to prove to show a breach of a condition of probation depends on the condition that was allegedly violated. The condition of Regan's probation that there be "no criminal violations of law" requires the State to prove an alleged violation of that condition beyond a reasonable doubt. Thus, the cases cited by the State do not directly address the issue.

For example, in Barry, the issue was whether the court abused its discretion when it revoked Barry's probation based on a subsequent robbery conviction. State v. Barry, 25 Wn. App. at 761. Unremarkably, the Barry court held there was no abuse of discretion. Id. at 762. If Regan had been convicted instead of acquitted, there would be no doubt he violated the "no criminal law violations" condition of his probation. Because Barry was convicted of the offense, which was the basis for the revocation of his probation, the case is distinguishable and does not shed any light on the issue in this case.

*In Cyganowski, another case cited by the State, the issue was whether the court abused its discretion when it conducted the probation revocation before the criminal trial on the same allegations. State v. Cyganowski, 21 Wn.App. at 120. In that case, Cyganowski entered a plea of guilty to grand larceny and was subsequently placed on probation. A

condition of probation was that he “refrain from engaging in any assaultive behavior.” Id. at 120. Cyganowski was later accused of swinging an axe at a person. A revocation hearing was held and the court found Cyganowski had engaged in assaultive behavior. After the hearing, Cyganowski was tried for the incident and was acquitted.

The Cyganowski court held the trial court did not abuse its discretion when it held the probation revocation before the trial because, given the terms of the probation condition, “a showing of assaultive behavior was needed to prove a violation of probation, and not a conviction of assault.” State v. Cyganowski, 21 Wn.App. at 121. The Cyganowski court additionally reasoned that “if the hearing had been delayed until after the trial, an acquittal would not have prevented a revocation of probation due to the differing standards of proof.” Id. (citing, Standlee v. Smith, 83 Wn.2d 405 and State v. Kuhn, 81 Wn.2d 648). The issue in Cyganowski was whether Cyganowski “engaged in assaultive behavior” despite an acquittal on the criminal charge of assault. It was reasonable for the court to find that while Cyganowski did not commit a criminal assault he nonetheless “engaged in assaultive behavior” in violation of that specific condition of his probation.

Here, the issue is whether Regan committed a “criminal violation of law” despite his acquittal of the criminal charges. Because the

probation condition in Cyganowski could be violated despite an acquittal, the case too lends little insight.

The case cited by the Cyganowski court for the proposition that an acquittal would not prevent the probation revocation, Standlee, was a parole violation case. Standlee's parole was revoked based on an allegations Standlee committed kidnapping, assault, rape and molestation. At a nonjury trial Standlee was acquitted based on an alibi defense. Standlee v. Smith, 83 Wn.2d at 722. After his trial, the hearing officer concluded Standlee committed the assault, despite the acquittal, and revoked his parole. Id.

The issue in Standlee was whether under the doctrine of collateral estoppel Standlee's acquittal prohibited the hearing officer from revoking his parole. Standlee v. Smith, 83 Wn.2d at 722. The Court held that because the standard of proof for finding a parole or probation violation was whether the hearing officer was reasonably satisfied a violation occurred, as opposed to the reasonable doubt standard of proof in a criminal prosecution, collateral estoppel did not apply. Id. at 723. The Court affirmed the revocation decision reasoning, "[h]ere the alibi witness created a reasonable doubt in the trial judge's mind and he necessarily acquitted petitioner. On the other hand, with a lesser standard of proof, the hearing officer believed the victims, discounted the alibi witness who had

created a reasonable doubt in the judge's evaluation and importantly felt the petitioner was a threat to society if at large." *Id.* (emphasis added).

The Sandlee decision does not identify the specific term or condition of parole Sandlee was alleged to have violated. It cannot be assumed with any confidence the term or condition of parole prohibited Sandlee from "no criminal violations of law" (the condition in this case) or some other term or condition, like in Cyganowski, where an acquittal of the criminal offense did not foreclose a finding a probation violation.

Here, the specific condition Regan allegedly violated was "no criminal violations of law." The Superior Court judge ruled that term required the State prove a violation under the reasonable doubt standard applicable to criminal cases. Moreover, the judge found the term was ambiguous. Implicit in that finding is the notion that a reasonable person would believe the term required the State to prove the violation under the same standard it would be required to prove any criminal violation. The decision was correct.

Criminal means "[h]aving the character" of a criminal offense; in the nature of a crime." Black's Law Dictionary 380 (7th Ed. 1999). Violation means "[a]n infraction or breach of the law; a transgression" or the "act of breaking or dishonoring the law." *Id.* at 1564. Under its plain language, to show a violation of the condition that Regan commit "no

criminal violations of law” the State was required to show Regan committed a criminal offense. And, to prove a “criminal violation” the State is required to prove each element of the crime beyond a reasonable doubt. In re Winship, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970).

The reasoning in Pattison v. Dep't of Licensing, 112 Wn.App. 670, 673, 50 P.3d 295 (2002) is instructive. Pattison argued the State Patrol implied consent warning, required under RCW 46.20.308(2), was misleading. The warning read in part: “You are further advised that your license, permit, or privilege to drive will be suspended, revoked, or denied if the test is administered and the test indicates the alcohol concentration of your breath is 0.08 or more, if you are age 21 or over, or 0.02 or more if you are under age 21; or if you are in violation of RCW 46.61.502, 46.61.503 or 46.61.504.” Id. at 676. Pattison argued that under the law, a driver only loses his or her license if the driver is convicted of violating one of the three mentioned statutes but the “in violation” language in the warning misled driver’s into believing that losing one’s license is an inevitable consequence of merely being arrested. Id. The Pattison court rejected that argument and held. “[t]he more reasonable understanding of the warning, in context, is that the phrase ‘if you are in violation of’ means ‘if you are prosecuted and convicted for.’ Id. See, Jury v. Dep't of

Licensing, 114 Wn.App. 726, 731, 60 P.3d 615 (2002), *review denied*, 149 Wash.2d 1034, 75 P.3d 968 (2003) (same).

Here, the reasonable understanding and meaning of the phrase “no criminal violations of law”, in context, is that a violation requires a conviction. Thus, as a matter of law, the Superior Court judge was correct when he held “that the chosen condition of ‘no criminal law violations’ requires that the burden of proof be beyond a reasonable doubt.” CP 55-56.

Additionally, notions of fairness also support the Superior Court’s decision. Regan was tried and acquitted. The jury concluded he did not violate any criminal law. To allow the State to ignore the jury’s verdict and impose a punishment based upon the same act pays nothing but lip service to the fundamental right to a jury trial and requirement the State prove a criminal offense beyond a reasonable doubt. If Regan had been convicted he would have been punished for the offenses and the conviction would have supported a finding he violated the terms of his probation. The jury, however, found him innocent, but he is being punished nonetheless because the Aberdeen Municipal Court judge disagreed with the jury’s verdict. Given that the “no criminal violations of law” condition means the State is required to prove a crime was

committed beyond a reasonable doubt, fairness does not countenance the decision to revoke Regan's probation.

In sum, the "no criminal violations of law" condition of Regan's probation, at a minimum, required the State to prove Regan violated the elements of a criminal statute beyond a reasonable doubt in order for the court to conclude Regan violated that condition. Because Regan was acquitted by jury of the criminal charges that were the basis of the allegation he violated the "no criminal violations of law" condition of his probation, the State failed to prove he violated that condition of his probation. Therefore, this Court should affirm the Superior Court's decision reversing the order revoking Regan's probation.

D. CONCLUSION

For the above reasons, this Court should affirm the Superior Court's decision.

DATED this 13 day of May, 2008.

Respectfully submitted,

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DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 13TH DAY OF MAY 2008, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF RESPONDENT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

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SIGNED IN SEATTLE WASHINGTON, THIS 13TH DAY OF MAY 2008.

x Patrick Mayovsky